No. 88-305

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

STATE OF SOUTH CAROLINA,
Petitioner
v.
DEMETRIUS GATHERS,
Respondent

On Writ of Certiorari to the Supreme Court of South Carolina

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION, THE REVEREND DOROTHY HAYNES, THE SUNNY VON BULOW NATIONAL VICTIM ADVOCACY CENTER, THE STEPHANIE ROPER COMMITTEE, INC., THE CRIME VICTIMS LEGAL CLINIC, PARENTS OF MURDERED CHILDREN, THE UNITY GROUP, INC., AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Pursuant to Rule 36.3 of the rules of this Court, *amici* respectfully move for leave to file the attached brief *amici curiae* in support of petitioner. Petitioner has consented to the filing of this brief. This motion is made necessary by the refusal of respondent's counsel to provide consent.

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with more than 120,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial amount of its resources to promoting victims' rights and criminal justice reform. In 1981, WLF published a "Crime Victims Impact Statement" manual to serve as a model guide for implementation at the state level of the use of victim impact information. WLF works with other victims' rights groups, including the *amici* in this case.

Over the last 8 years, WLF has also appeared as *amicus curiae* in numerous death penalty cases before this Court and lower federal courts. *See, e.g., Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Zant v. Stephens*, 462 U.S. 862 (1983); *McCleskey v. Kemp*, 107 S. Ct. 1756 (1987). WLF also filed *amicus curiae* briefs in the district courts in the Walker spy ring cases, and participated in oral argument in *United States v. Jerry Alfred Whitworth*, No. CR 85-552 JV (N.D. Cal.), arguing that the federal death penalty for espionage can be constitutionally applied since the federal sentencing procedures meet the two constitutional requirements cited in *Furman v. Georgia*, 408 U.S. 238 (1972): 1) the federal system, unlike that of Georgia and other states at the time, has a bifurcated trial for the guilt and sentencing phase, and 2) the defendant can present whatever mitigating factors he desires before the federal judge, an experienced sentencing authority who also has available a pre-sentence report.

The Rev. Dorothy Haynes is the mother of Richard Haynes, who was brutally murdered by Demetrius Gathers, respondent in this case. Rev. Haynes testified at the guilt phase of the trial below. Her testimony, which was not objected to, included statements about the religious artifacts her son was carrying which were found near his body at the time he was murdered. The comments by the prosecutor to the same jury during the penalty phase of trial about Rev. Haynes' testimony was the cause for reversal of the capital sentence in this case.

The Sunny von Bulow National Victim Advocacy Center is a national, non-profit organization based in Fort Worth, Texas. The Center's purposes are to promote responsiveness of the criminal justice system to the rights and needs of the victims of violent crime, as well as to increase public awareness concerning the plight of crime victims through educational programs, conferences, and publications.

The Stephanie Roper Committee, Inc. is a non-profit organization based in Upper Marlboro, Maryland which was founded in 1982 by Roberta Roper, the mother of Stephanie, who was brutally kidnapped, raped, tortured, and murdered. The Stephanie Roper Committee is a victims' rights advocacy organization which has proposed legislation responsive to the needs of victims. One such proposal enacted into law was the Victim Impact Statement Law which was the subject of the challenge in *Booth v. Maryland*. The Roper Committee also filed an *amicus curiae* brief in that case.

The Crime Victims Legal Clinic is a project of the California Center on Victimology, a comprehensive crime victim service agency founded in 1985 based in San Diego, California. Among the goals of the clinic is to provide training to the legal and mental health communities who counsel and treat victims of crime; to reduce the trauma suffered by crime victims, their families, and the community in which they live; and to promote and implement the "Victim Bill of Rights."

Parents of Murdered Children (POMC), founded by the parents of Lisa Hullinger, who was murdered in 1978, is a national non-profit, self-help support organization based in Cincinnati, Ohio, with chapters nationwide.

Besides providing support for grieving parents and family members, POMC provides information about the criminal justice system, and seeks to make that system responsive to the needs of the victim's family.

The Unity Group, Inc. is a Maryland-based advocacy group for battered women and their children that urges criminal prosecution of the abuser where appropriate, provides assistance to victims, and helps make the law enforcement community and judicial system responsive to the special needs of victims of domestic violence.

The Allied Educational Foundation is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus* before this Court on a number of occasions.

All of the above-named *amici* wish to present a broader perspective of the issues in this case in order to assist this Court in its disposition. *Amici* believe that they should be entitled, as provided by law, to provide information to the sentencing authority concerning the impact of the murder upon the victim's family, regardless of whether the case is a capital one or not. Indeed, in a capital case, it is especially important for the victim's family to be able to inform the sentencing authority, whether judge or jury, about the impact that the murder has had on them, and, therefore, on society.

For the foregoing reasons, *amici curiae* respectfully request that they be allowed to participate in this case and file the annexed brief *amici curiae*. *Amici* are in a unique position to aid the Court in its consideration of the issues presented. The interests of *amici* are direct and substantial. The participation of the *amici* will facilitate the Court's thorough consideration of the issues and will bring important perspectives to bear. Accordingly, *amici* respectfully request that their motion for leave to file an *amici curiae* brief in support of petitioner be granted.

Respectfully submitted,

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QUESTIONS PRESENTED FOR REVIEW

I. Does the Eighth Amendment preclude a prosecutor's comments during the penalty phase of a capital murder case on personal characteristics of the victim where the characteristics are based on evidence admitted in the guilt phase to show the circumstances of the crime?

II. Does *Booth v. Maryland*, 107 S.Ct. 2529 (1987), preclude prosecutorial comment during a penalty phase closing argument on evidence introduced during the guilt phase of the trial that reveals personal characteristics of the victim?

III. Did this Court's decision in *Booth v. Maryland* misconstrue the requirements of the Eighth Amendment and wrongly decide the case?

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INTERESTS OF AMICI CURIAE

The interests of the *amici curiae* are set out fully in the Motion for Leave to File accompanying this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court has granted certiorari to review three closely-related questions concerning the sentencing procedure in a capital murder case. The very substance of the first two questions presented invites an inquiry as to the third, for, in essence, the Supreme Court finds itself reviewing whether it is *prejudicial error of constitutional dimension* for a jury sentencing a convicted first degree murderer to hear the prosecutor comment on evidence that the victim carried a voter registration card and was a religious person even when that evidence has already been properly admitted during the guilt phase of the trial to show the circumstances of the crime. The Supreme Court of South Carolina condemned the prosecutor's comment on the victim's personal characteristics as a violation of the Cruel and Unusual Punishments Clause of the Federal Constitution, relying on *Booth v. Maryland*, 107 S. Ct. 2529 (1987).

This Court has recognized that a bifurcated criminal trial procedure using the same jury for both verdict and sentencing, such as the one used in this case, allows the jury to consider all evidence admitted during the guilt phase of a capital case in arriving at an appropriate sentence. *Zant v. Stephens*, 462 U.S. 862, 865-66 (1983). One searches in vain for a credible challenge on grounds of procedural due process, fundamental fairness, or even basic evidentiary rules either to the jury's consideration

of such evidence when sentencing, or to fair comment on such evidence by the prosecutor. This issue is before the Court as a matter of constitutional interpretation because of *Booth's* tortuous application of the Punishments Clause to capital sentencing procedure.

We respectfully submit that the Court finds itself at this curious juncture of criminal procedure and constitutional law because of its flawed Eighth Amendment jurisprudence and the distorting effect this has had on the Court's proper role in judicial review of capital sentencing procedure. In his opinion for the Court in *McGautha v. California*, Justice Harlan warned that it would be impossible to solve "the intractable . . . problem of 'standards' which the history of capital punishment has from the beginning reflected." 402 U.S. 183, 207 (1971). In the jurisprudence developed in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972), the Court has attempted this impossible task, based in large measure on the Justices' individual perceptions of "the evolving standards of decency that mark the progress of a maturing society." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion), quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

If the Court persists in its present approach, it will find itself repeatedly creating constitutional distinctions, judicially woven into the fabric of the Punishments Clause, between the minutiae of evidentiary and procedural rules presented on review of capital sentencing proceedings. A decision merely distinguishing *Booth* from the present case [1] will afford little guidance to lower

[1] *Booth* condemned a victim impact statement that addressed not only the personal characteristics of the victim, but also the impact of the murder on the victim's family and the family's opinion as to the nature of the crime and the perpetrator's potential for rehabilitation. These facts or opinions were not admitted into evidence during the guilt phase of the trial. In contrast, *Gathers* involves only a "quick glimpse of the life [the murderer] chose to extinguish," as in *Mills v. Maryland*, 108 S. Ct. 1860, 1876 (1988) (Rehnquist, C.J., dissenting), based on evidence already before the jury during the guilt phase.

courts [2] and legislatures and will not extricate the Court from its self-appointed role. Instead, the Court should belatedly heed its own recognition that "[c]aution is necessary lest this Court become, 'under the aegis of the Cruel and Unusual Punishments Clause, the ultimate arbiter of the standards of criminal responsibility . . . throughout the country.'" *Gregg*, 428 U.S. at 176 (plurality opinion), quoting *Powell v. Texas*, 392 U.S. 514, 533 (1968) (plurality opinion).

Alternatively, *Booth* should be overruled because it was wrongly decided even in the context of the Court's earlier decisions construing the Punishments Clause. There is no general constitutional objection to a victim's participation in the criminal process, including sentencing proceedings. Furthermore, such participation would serve important social purposes emphasized by the Court in its earlier opinions. It is appropriate for the full measure of a murderer's responsibility for his crime to include the real harm caused to the victim and his family, not merely an abstract assessment of *mens rea*. Finally, such participation would also help to balance the kind of mitigation evidence typically offered by defendants in the sentencing phase of a capital case.

ARGUMENT

I. *BOOTH v. MARYLAND* SHOULD BE OVERRULED BECAUSE IT IS THE APOTHEOSIS OF A FLAWED JURISPRUDENCE OF THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE.

A. The Punishments Clause Was Originally Understood Solely As a Prohibition of Torture and Other Barbarous Punishments.

The language of the Punishments Clause originated in the English Bill of Rights of 1689, which provided: "That excessive bail ought not to be required, nor excessive

[2] *Booth's* rationale has already led to interesting results in the federal courts. In *Robison v. Maynard*, 829 F.2d 1501 (10th Cir. 1987), the court, citing *Booth*, affirmed the exclusion of *defendant's* presentation of testimony by the murder victim's relatives, who would have asked the jury *not* to impose the death penalty.

fines imposed, nor cruel and unusual punishments inflicted." This provision was incorporated verbatim into the Virginia Declaration of Rights by George Mason in 1776, and shortly thereafter found its way into the constitutions of eight other states and the Northwest Ordinance of 1787. With a minor change in wording ("shall not be" instead of "ought not to be"), it was adopted in 1791 as the Eighth Amendment.[3]

There has been some debate as to the purpose of the language about cruel and unusual punishments in the English Bill of Rights. This language was traditionally thought to have been adopted in response to the harsh punishments meted out by Lord Justice Jeffreys in the "Bloody Assize." Modern scholarship has indicated that the language more likely refers to punishments inflicted upon Titus Oates for giving perjured testimony leading to the erroneous execution of a number of supposed participants in the infamous "Popish Plot" of 1678-79.[4] "In the context of the Oates case, 'cruel and unusual' seems to have meant a severe punishment unauthorized by statute and not within the jurisdiction of the court to impose."[5]

The debate over the meaning of this language in the English Bill of Rights has become significant because all available evidence indicates that the American framers of the Punishments Clause intended it solely as a prohibition of torture and other barbarous punishments.[6] Throughout the Nineteenth Century this Court and the

[3] *Furman v. Georgia*, 408 U.S. 238, 319 (Marshall, J., concurring); Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 Calif. L. Rev. 839, 839-40 (1969).

[4] *Furman v. Georgia*, 408 U.S. at 317-18 (Marshall, J., concurring); Granucci, *supra* note 3, at 852-59; *see* R. Berger, *Death Penalties: The Supreme Court's Obstacle Course* 35-40 (1982).

[5] Granucci, *supra* note 3, at 859.

[6] *Furman v. Georgia*, 408 U.S. at 319-21 (Marshall, J., concurring); Granucci, *supra* note 3, at 840-44. Granucci attributes this American understanding to a misreading of English legal history. *Id.* at 860-65.

commentators treated the Punishments Clause as applying to methods of punishment regarded as inherently barbarous, such as burning at the stake, crucifixion or breaking on the wheel.[7] The clause was not thought to authorize judicial review of the proportionality of a punishment to the offense.

In recent years, the circumstances giving rise to this provision in the English Bill of Rights have been invoked to justify a broader conception of the Punishments Clause than the understanding of the American framers.[8] This approach is unwarranted for two reasons.

First, the only relevant original meaning is that given the clause by the people who framed and ratified it in 1791. If the English used the words in a different sense in 1689, and that meaning was unknown in America in 1791, then it can hardly bear on the original meaning of the Eighth Amendment. And the authorities are generally in agreement that the American framers understood the clause to prohibit inherently cruel methods of punishment and not those that were disproportionate to the offense.[9]

Second, it exaggerates the history of the English Clause to say that it reflects an understanding that a punishment must be proportioned to the severity of the crime. The concern in Titus Oates' case seems to have been that the punishments were unauthorized by statute or custom. At a time when petty theft was a capital offense, it strains credibility to believe that the English thought Oates' punishments disproportionately severe for a perjurer whose testimony had caused fifteen innocent men

[7] *See, e.g., In re Kemmler*, 136 U.S. 436, 446 (1890).

[8] *Solem v. Helm*, 463 U.S. 277, 284-86 (1983); *Rummel v. Estelle*, 445 U.S. 263, 288 (11980); *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (plurality opinion); *Furman v. Georgia*, 408 U.S. 238, 318 (1972) (Marshall, J., concurring).

[9] Granucci, *supra* note 3, at 843-44; R. Berger, *supra* note 4, at 43-45; *see Solem v. Helm*, 463 U.S. at 313 n.6 (Burger, C.J., dissenting).

to be executed. And, in fact, Oates' sentence—while criticized in some quarters—was upheld by the House of Lords a few months after the promulgation of the Declaration of Rights.[10]

In any event, America's Bill of Rights, as adopted, clearly contemplated the lawful imposition of capital punishment in the language of the Fifth Amendment [11], and the death penalty has been part of federal and state criminal law since the beginning of the Republic. Likewise, the Fourteenth Amendment, ratified in 1868, explicitly refers to the death penalty.[12]

B. Beginning With *Weems* and *Trop*, the Court Has Incorrectly Identified the Clause With the Myth of Progressive Enlightenment.

The historical approach to the Punishments Clause was abandoned when the Court began to apply a theory of progressive societal enlightenment as the basis of its jurisprudence.

In *Weems v. United States* [13], the Court expanded the meaning of the Punishments Clause beyond a limitation on the *methods* of punishment to include a review of the *proportionality* of the punishment to the crime. Weems received a sentence of *cadena temporal* for the offense of making a false entry in a government account book.[14]

[10] R. Berger, *supra*, note 4, at 37-40.

[11] "No person shall be held to answer for a *capital* . . . crime, unless on a presentment or indictment of a Grand Jury . . .; nor shall any person be subject for the same offence to be twice put in jeopardy of *life* or limb . . . nor be deprived of *life* . . . without due process of law . . . ." U.S. Const. amend. V (emphasis added).

[12] ". . . nor shall any State deprive any person of life . . . without due process of law . . . ." U.S. Const. amend. XIV, § 1.

[13] 217 U.S. 349 (1910).

[14] This punishment, imposed in the Territory of the Philippines, included twelve years of "hard and painful labor" in chains, as well as accessory penalties including lifetime surveillance by government authorities. 217 U.S. at 364-66.

Although the Court indicated that aspects of the sentence were inherently cruel, it also held that the sentence was invalid because it was disproportionately severe.[15]

Justice McKenna's opinion in *Weems* contains a well-known discussion of the need for a living constitution.[16] He concluded that the Punishments Clause is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.* at 378 (citations omitted). The *Harvard Law Review* praised the decision in *Weems* as "a triumph of enlightenment over history." [17]

This theory of progressive enlightenment was again invoked in *Trop v. Dulles* [18], which invalidated denationalization as a statutory sanction for desertion from the armed forces in wartime. Chief Justice Warren's plurality opinion cited *Weems* for the proposition that the Eighth Amendment was not "static" in scope, *id.* at 101, and concluded that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* The deci-

[15] 217 U.S. at 377. This holding thus adopted the position advocated in *O'Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting) (in addition to inherently cruel methods of punishment, Clause bars "all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged"). Justice White's dissenting opinion in *Weems*, joined by Justice Holmes, vigorously disputes the notion that the Punishments Clause authorizes courts to review the proportionality of criminal sentences. 217 U.S. at 382. The practical effect of the holding in *Weems* was limited by *Badders v. United States*, 240 U.S. 391 (1916) (Holmes, J.), in which the Court eschewed a role in the case-by-case review of the proportionality of sentences to crimes.

[16] "Time works changes, [and] brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth." 217 U.S. at 373. *See also id.* at 373-75.

[17] Note, *What is Cruel and Unusual Punishment*, 24 Harv. L. Rev. 54 (1910), *cited in* Granucci, *supra* note 3, at 843.

[18] 356 U.S. 86 (1958).

sion in *Trop* did not involve the issue of proportionality review, but rather whether denationalization is an inherently unconstitutional method of punishment.[19] The plurality opinion concluded that it was, because it resulted in "the total destruction of the individual's status in organized society." *Id.*

The doctrine that the Punishments Clause encompasses proportionality review, although weak in historical support, has some textual logic. It appears as part of an amendment that bars "excessive bail" and "excessive fines."[20] There is also some historical support for a concept of proportionality in the common law of England, although this concept is not clearly tied to the adoption of the Punishments Clause as part of the Eighth Amendment.[21] The opinion of the Court in *Solem v. Helm* justifies proportionality review solely on the basis of historical and textual analysis.[22]

However, the rationale stated in *Weems* and *Trop*—that the Punishments Clause must be interpreted to reflect the evolving decency of human society—is extraconstitutional in origin. It derives from doctrines of cul-

[19] The opinion acknowledged that "[s]ince wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime." 356 U.S. at 99. The opinion also stated that the death penalty "cannot be said to violate the constitutional concept of cruelty." *Id.*

[20] *See Furman v. Georgia*, 408 U.S. at 403 (Marshall, J., concurring); *O'Neil v. Vermont*, 144 U.S. at 340 (Field, J., dissenting) ("The whole inhibition [of the Eighth Amendment] is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted.")

[21] Granucci contended that the amercements clause of the Magna Carta and other common law developments prior to 1689 gave rise to a general principle of proportional punishment. Granucci, *supra* note 3, at 844-47. This aspect of his scholarship has been both criticized and defended. R. Berger, *supra* note 4, at 30-35; S. Gillers, *Berger Redux*, 92 Yale L.J. 731, 733-40 (1983).

[22] 463 U.S. at 284-90.

tural evolution that were particularly fashionable in the Nineteenth and early Twentieth Centuries.

In an influential book first published in 1920, *The Idea of Progress*, Professor J.B. Bury surveyed the intellectual history of this concept. He defined the idea of Progress as "based on an interpretation of history which regards men as slowly advancing—*pedetemtim progredientes*—in a definite and desirable direction, and infers that this progress will continue indefinitely."[23] Through doctrines such as Positivism,[24] Marxism and Social Darwinism,[25] the idea of Progress permeated the political philosophy of the time.

It is not surprising for a Court that embraced Spencer's economic doctrines in such decisions as *Lochner v. New York* also to embrace in *Weems* his doctrine of moral evolution.[26] What is surprising, however, is that a modern Court, having seen the wars and holocausts of our century, could continue to base constitutional doc-

[23] J.B. Bury, *The Idea of Progress* 5 (1932 ed.). *See also* Pineda, "Civilization and Cultural Evolution," 4 Encyclopedia Britannica 657-60 (15th ed. 1982).

[24] Comte, for example, believed that mankind had progressed through theological and metaphysical periods to a third or Positive period, which will feature "the organization of society by means of scientific sociology." This period will be controlled by "savants who will direct social life not by theological fictions but by the positive truths of science." J.B. Bury, *supra*, at 299-300. Comte is regarded as the "father" of sociology.

[25] Herbert Spencer's *Social Statics* reflects the view that principles of biological evolution apply in the moral sphere as well. Spencer "begins by arguing that the constancy of human nature, so frequently alleged, is a fallacy. For change is the law of all things." He thus concludes that "perfectability is possible." Next, he argues that "evil is not a permanent necessity. For all evil results from the non-adaptation of the organism to its conditions; this is true of everything that lives. And it is equally true that evil perpetually tends to disappear." J.B. Bury, *supra*, at 337.

[26] Justice Holmes, who joined the dissenting opinion in *Weems*, made the well-known remark in his *Lochner* dissent that the Constitution "does not enact Mr. Herbert Spencer's Social Statics." 198 U.S. 45, 75 (1905).

trine on the supposition that a maturing society will necessarily enjoy "evolving standards of decency." [27]

We do not ask the Court to decide that the doctrines of Comte, Marx and Spencer are wrong, even though we may have an opinion on that matter.[28] Our point is that the Framers did not embody such ideological considerations in the Punishments Clause. It is certainly appropriate for legislators to be influenced by ideological considerations. For judges, reliance on extraconstitutional ideologies should be anathema.[29]

Our opposition to an "evolving standard of decency" approach to the Punishments Clause does not mean that we believe the Court must ignore changing circumstances. Although some authorities have advocated a strictly historical approach to this clause,[30] it is certainly possible that technological changes will render methods of punish-

[27] *See* P. Johnson, *Modern Times: The World From the Twenties to the Eighties* 731 (1983):

> Darwin himself always stressed the limits of his discoveries. He discouraged those who sought to build ambitious projections on them. That was why he gave no license to the theories of the 'Social Darwinists', which terminated in Hitler's holocaust, and why he likewise brushed off Marx's attempts to appropriate Darwinism for his own theories of social determinism, which eventually produced the mass murders of Stalin, Mao Tse-tung and Pol Pot.

[28] *See* T. Sowell, *A Conflict of Visions* (1987).

[29] This was the general point of Alexander Bickel's 1969 Oliver Wendell Holmes lectures, published as A. Bickel, *The Supreme Court and the Idea of Progress* (1970). Despite some earlier antecedents, the idea of Progress did not predominate until later in the Nineteenth Century. *See* J.B. Bury, *supra* note 23, at 334-49.

[30] *See McGautha v. California*, 402 U.S. 183, 225 (1971) (Black, J., concurring) ("As an original proposition, it is by no means clear that the prohibition against cruel and unusual punishments embodied in the Eighth Amendment . . . was not limited to those punishments deemed cruel and unusual at the time of the adoption of the Bill of Rights."). Justice Holmes also supported that view, joining Justice White's dissent in *Weems v. United States*, 217 U.S. 349, 409-11, 413 (1910).

ment "cruel and unusual" today that were not so in 1791.[31] However, this would not be because the old values in the Constitution have evolved into new and better values, but that the same unchanging values are applied in a different factual situation.

C. Disregarding Justice Harlan's Warning in *McGautha*, the Court Has Improperly Used the Clause to Regulate the Procedures for Imposing Capital Punishment.

Just over a year before its *Furman* decision, the Court decided whether a jury could constitutionally impose the death penalty in a murder case without governing standards to guide its exercise of discretion. *McGautha v. California*, 402 U.S. 183 (1971). Justice Harlan, writing for the Court, emphasized the constitutional principles that should guide the exercise of judicial power in review of such cases:

> Our function is not to impose on the States, ex cathedra, what might seem to us a better system for dealing with capital cases. . . . [T]he Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology, or even those that measure up to the individual predilections of members of this Court. The Constitution requires no more than that trials be fairly conducted and that guaranteed rights of defendants be scrupulously respected.

Id. at 195, 221 (citations omitted).

Thirteen months later this sound constitutional approach to capital sentencing procedure was cast aside for an Eighth Amendment analysis that confused courts and

[31] For example, the availability of lethal injections could make execution by hanging a cruel and unusual method of punishment in today's society. Opponents of capital punishment have taken varying positions regarding lethal injection. *See* G. Smith, *Capital Punishment 1986: Last Lines of Defense* 28-33 (1986).

legislatures and led to continued misapplication of the Eighth Amendment in subsequent cases.

The majority's *per curiam* decision in *Furman* held that the imposition of the death penalty constituted cruel and unusual punishment in violation of the Eighth Amendment, as applied to the states through the Fourteenth Amendment. 408 U.S. at 239. Each of the five separate concurring opinions arrived at the same result on different routes.

Within four years of the *Furman* decision, at least thirty-five states had reacted by enacting new death penalty statutes. In upholding a new Georgia statute in *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court acknowledged that the "standards of decency" argument asserted in *Furman* had been substantially undercut by this flurry of legislative activity. *Id.* at 179 (plurality opinion).[32] But, having concluded that the death penalty was not unconstitutional *per se*, *id.* at 187 (plurality opinion), the Court persisted using the Eighth Amendment to prescribe in great detail the procedures to be followed in capital punishment cases.

D. After Initially Condemning Discretion, the Court Has Unwisely Held that the Clause Requires Open-ended Discretion to Withhold Imposition of Capital Punishment.

In two lines of cases decided after *Furman*, the Court has undermined the concern expressed in some of the concurring opinions about the excessive discretion that characterized the death penalty statutes that were declared unconstitutional. The effect of these cases is to

[32] Proponents of a living Constitution face the same risk as parents whose children may grow up in ways they did not anticipate. It could be argued that the fear of violent crime has made our society less "decent" now than it was in 1972. Public opinion, which was quite ambivalent regarding capital punishment in the early 1970's, now overwhelmingly favors its use. "Gallup polls, which showed 50 percent of Americans favoring capital punishment in 1972, recorded an increase to 72 percent by 1987 . . . ." Wash. Post, Nov. 27, 1988, at A36, col. 1.

give a jury the unbridled discretion to withhold imposition of the death penalty in any case.[33]

One of these lines of cases precludes the states from defining any category of crime, no matter how serious, for which the death penalty is mandatory. The Court began by holding that a mandatory death penalty for first-degree murder was a cruel and unusual punishment because it violated "contemporary standards regarding the infliction of punishment." *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976) (plurality opinion); *accord, Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976). The Court continued by holding unconstitutional a statute imposing a mandatory death penalty for the first-degree murder of a police officer engaged in the performance of his duty. *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977) (per curiam). Finally, the Court held recently that a mandatory death penalty could not be imposed for first-degree murder committed by an inmate serving a life term sentence. *Sumner v. Shuman*, 107 S. Ct. 2716 (1987).

The other line of cases requires state courts to permit jurors unlimited discretion to consider mitigating circumstances at the sentencing phase. In *Lockett v. Ohio*, 438 U.S. 586 (1978), the plurality opinion condemned any limitations on the defendant's proffer of matters in extenuation or mitigation. The Court indicated that its ruling did not limit "the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Id.* at 604, n.12. However, in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Court retreated

[33] This approach has been aptly characterized as constituting an "about-face since *Furman*," which has the Court going "from pillar to post" in search of theories to invalidate the imposition of capital punishment. *Lockett v. Ohio*, 438 U.S. 586, 622 (White, J., concurring and dissenting in part, and concurring in the judgment); *id.* at 629 (Rehnquist, J., dissenting).

from this indication that mitigation evidence could be scrutinized for relevance.[34]

These two related lines of cases are squarely based upon the "evolving standards of decency" approach to the Punishments Clause.[35] Under this approach, the Court has held that the penological theory of discretionary sentencing represents the enlightened view of society and thus is constitutionally mandated in capital cases.

In *Woodson*, the plurality opinion explained this rationale as follows:

> Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development. While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment [requires this approach].

428 U.S. at 304 (citations omitted).[36]

The same rationale is also found in the *Lockett* plurality opinion, which observes at one point: "Most would

[34] There, the Court vacated a death sentence because the trial court, apparently on grounds of relevance, refused to consider certain evidence presented by the defendant. This included testimony that he had been raised without proper guidance, that his mother had been an alcoholic and possibly a prostitute, that he had been subject to physical punishment as a child, and that he was emotionally disturbed. 455 U.S. at 107.

[35] In *Woodson*, for example, the plurality opinion repeatedly cites to the plurality opinion in *Trop v. Dulles*. 428 U.S. at 288, 301, 304.

[36] In *Stanislaus Roberts*, the plurality opinion elaborated on this rationale by adverting to "our society's rejection of the belief that 'every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.'" 428 U.S. at 333, quoting *Williams v. New York*, 337 U.S. 241, 247 (1949).

agree that 'the 19th century movement away from mandatory death sentences marked an enlightened introduction of flexibility into the sentencing process.'" 438 U.S. at 603, quoting *Furman v. Georgia*, 408 U.S. at 402 (Burger, C.J., dissenting). The opinion recognizes that the prevalent "public policy" of sentencing discretion is the product of legislative choice rather than constitutional mandate. However, the opinion concludes that the same "considerations that account for the wide acceptance of individualization of sentences in noncapital cases" justify requiring it as a matter of constitutional law in capital cases. 438 U.S. at 605.[37]

The opinion of the Court in later cases such as *Roberts (Harry)*, *Sumner v. Shuman*, and *Eddings* simply adopt without much elaboration the rationale of the plurality opinions in *Woodson* and *Lockett*.

We have already explained why the progressive enlightenment theory of *Weems* and *Trop* is an illegitimate basis for interpreting the Punishments Clause. It is important to recognize that in *Woodson*, *Lockett* and their progeny the Court went well beyond the holding of *Weems* regarding proportional punishment. Today, we are told that enlightened social theory requires punishment to be proportional, not to the *crime*, but to the *criminal*.

Moreover, even if the meaning of the Eighth Amendment reflects changes in social theory, then the rationale of *Woodson* and *Lockett* is simply out of date. The evolution of sentencing theory and practice now strongly supports mandatory sentencing as the more enlightened pol-

[37] The *Lockett* opinion bases this distinction in part on the *Woodson* epigram that "the penalty of death is qualitatively different." 428 U.S. at 305. It also argues that: "A variety of flexible techniques—probation, parole, work furloughs, to name a few—and various postconviction remedies may be available to modify an initial sentence of confinement in noncapital cases." *Id.* As we note below with regard to discretionary sentencing, however, these techniques of post-sentence flexibility have come under serious criticism in recent years. *See* note 38 *infra*.

icy.[38] Thus, even if one applies this evolutionary approach to the Eighth Amendment, it provides no support for invalidating a mandatory death penalty for first-degree murder.

E. Finally, in *Booth* the Court Erred in Holding that the Clause Mandates a Theory of Punishment Inconsistent With the Consideration of Victim Impact Evidence.

In *Booth v. Maryland*, the Court applied its Punishments Clause jurisprudence to the use of a victim impact statement in the sentencing phase of a capital trial. The Court held it was unconstitutional for the jury to consider information about the character of the victim, the impact of the crime on the victim's family or their sentiments about the crime. 107 S. Ct. at 2532-36.

We will argue in part II *infra* that *Booth* is incorrect for reasons unrelated to our criticisms of the Court's recent jurisprudence of the Punishments Clause. First, however, we examine how *Booth* is the product of that flawed jurisprudence.

Booth, of course, continues the Court's effort to build a set of procedural requirements for the death penalty under the Punishments Clause that is entirely separate from any analysis under the Due Process Clause as in *McGautha*. Indeed, the Court in *Booth* carefully states that its opinion carries no implication concerning the use

[38] *See* S. Kadish, S. Schulhofer & M. Paulsen, *Criminal Law and its Processes* 1106-26 (4th ed. 1983) (materials on the determinate sentence reform movement); K. Starr, "The Impetus for Sentencing Reform in the Criminal Justice System," in *Crime and Punishment in Modern America* 299-312 (P. McGuigan & J. Pascale, eds., 1986); Ogletree, *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 Harv. L. Rev. 1938, 1940-44 (1988); Lowe, *Modern Sentencing Reform: A Preliminary Analysis of the Proposed Federal Sentencing Guidelines*, 25 Am. Crim. L. Rev. 1 (1987). Congress adopted the policy of mandatory sentencing guidelines for all federal courts in the Sentencing Reform Act, part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984).

of victim impact evidence in non-capital cases. *Id.* at 2536 n.12.[39] As stated above, we believe the Court should return to considering procedural issues of this nature under the framework of *McGautha*.

Booth is also based upon the view that evolving standards of decency require capital punishment to reflect an "*individualized* determination" based upon each defendant's unique situation. *Id.* at 2532 (quoting *Zant v. Stephens*, 462 U.S. at 879). This, of course, reflects the once-fashionable theory that rejected mandatory sentencing for a discretionary and individualized approach. We also believe this rationale is unwarranted. *See* part I.D. *supra*.

At bottom, however, *Booth* reflects a view that evolving standards of decency require a utilitarian approach to punishment. This is not expressly stated in the opinion, but becomes clear upon examining its antecedents and effect.

A basic value of victim impact evidence is to satisfy the need of the victim (including in a murder case the victim's family) to seek retribution for a grievous loss. A sentencing procedure that permits victims to have direct or indirect input into the sentencing process obviously satisfies this purpose more effectively than one in which their voice is excluded. *Booth* treats such input from victims as irrelevant to any proper sentencing considerations. 107 S. Ct. at 2534-36.

Why is the victim's desire for retribution irrelevant? Some members of the Court have indicated that evolving

[39] It has been argued that the rationale of *Booth* should be extended to non-capital cases. Note, *Booth v. Maryland—Death Knell for the Victim Impact Statement?* 47 Md. L. Rev. 701, 722-31 (1988). In view of the Court's rejection of a distinction between capital punishment and prison sentences for purposes of the Punishments Clause in *Solem v. Helm*, 463 U.S. 277 (1983), this argument is not too far-fetched. However, we are not aware of any case thus far in which a lower court has applied *Booth* to non-capital sentencing.

standards of decency have brought us to a point where retribution is no longer a proper goal of criminal punishment. Justice Marshall's concurring opinion in *Furman* states in part:

> Our jurisprudence has always accepted deterrence in general, deterrence of individual recidivism, isolation of dangerous persons, and rehabilitation as proper goals of punishment. Retaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society.
>
> Punishment as retribution has been condemned by scholars for centuries, and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance.

408 U.S. at 343 (citations and footnote omitted). *See also id.* at 387 (Brennan, J., concurring).

Here, again, one wonders what constitutional source justifies the rejection of a retributionist theory of punishment for a utilitarian approach. In fact, both theories were known at the time the Eighth Amendment was adopted.[40] Since then, the relative popularity of the theories has varied from time to time.[41] In his lecture on the criminal law first published in 1881, Oliver Wendell Holmes observed as follows:

> It certainly may be argued, with some force, that it has never ceased to be one object of punishment to satisfy the desire for vengeance . . . .
>
> The statement may be made stronger still, and it may be said, not only that the law does, but that it ought to, make the gratification of revenge an object. This is the opinion, at any rate, of two authorities so great, and so opposed in their other views, as

[40] *See* Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 Stan. L. Rev. 838, 845-53 (1972).

[41] *See* W. Berns, *For Capital Punishment* 41-82, 128-52 (1979) (discussing the rise and fall of rehabilitative, deterrent and retributionist theories of punishment since the Eighteenth Century).

> Bishop Butler and Jeremy Bentham. Sir James Stephen says, 'The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite.' [42]

Holmes went on to indicate that the criminal justice system could appropriately reflect in various ways all of the theories of punishment. Our point in presenting this discussion is that we have no reason to assume that the Framers meant to incorporate one theory rather than the other into the Punishments Clause.

However, if the Constitution embodies the latest trend in evolving social theory, then the Court's insistence upon a utilitarian approach to punishment is out of date. In recent years, there has been a great change in penological thought. The utilitarian theories have been at least partially discredited, and the retributionist theory is now quite popular. One commentator has summarized this trend as follows:

> In the modern area, judicial sentencing philosophy had changed radically; rather than requiring that the punishment fit the crime, judges adopted the view that the punishment should fit the offender. During the 1950's, the predominant judicial philosophy of punishment, as well as the prevailing view of penologists favored the concepts of deterrence and rehabilitation over the concepts of retribution and incapacitation. More recently, however, the emphasis has shifted again; both judges and penologists have expressed considerable skepticism about the value of rehabilitation. Support is growing in the courts and Congress for a crime control model of punishment based primarily upon retribution and incapacitation.[43]

[42] O.W. Holmes, *The Common Law* 40, 41 (1923 ed.).

[43] Ogletree, *supra* note 38, at 1940-41 (footnotes omitted). *See also* W. LaFave & A. Scott, *Criminal Law* 26-29 (2d ed. 1986); Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 Wis. L. Rev. 781 (1976).

A court whose jurisprudence of the Punishments Clause requires it to reflect "evolving standards of decency" cannot today claim that considerations of retribution must be excluded from the capital sentencing process.

II. ALTERNATIVELY, *BOOTH* SHOULD BE OVERRULED BECAUSE IT IS ERRONEOUS EVEN IN THE CONTEXT OF THE COURT'S OTHER DECISIONS UNDER THE PUNISHMENTS CLAUSE.

A. There Is No General Constitutional Impediment to According a Victim Standing to Participate in the Criminal Process, Including Sentencing.

It is a legal fiction of comparatively recent origin that only the state has an interest in the prosecution of crimes. In England prior to the Nineteenth Century, criminal prosecution was primarily the responsibility of the victim. Public prosecutors were actually more common in the colonies at the time of the American Revolution. Still, private prosecution was accepted in the United States at the time the Eighth Amendment was adopted and for some years thereafter.[44] In light of this history, it would be hard to say that the Framers thought that victim participation in criminal prosecution raised a constitutional doubt. Nor can it be said that the move to public prosecution reflected a desire to eliminate any role for the victim.[45]

Even today, however, private prosecution of crimes is permitted in a number of states. Although the propriety of allowing a victim to control the prosecution of a crime has been called into question, the point is a debatable

[44] See Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 Pepperdine L. Rev. 117, 125-32 (1984); Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 Harv. J.L. & Pub. Pol'y 357, 359-72 (1986); Benson, *The Last Victim and Other Failures of the Public Law Experiment*, 9 Harv. J.L. & Pub. Pol'y 399, 400-12 (1986).

[45] Goldstein, *The Victim and Prosecutorial Discretion: The Federal Victim and Witness Protection Act of 1982*, 47 Law & Contemp. Probs. 225, 245 (1984).

one.[46] The existence of a close debate on victim control of prosecution suggests that more limited victim participation in the nature of an impact statement should not be constitutionally questionable.[47]

In fact, victim preferences play an important if informal role in many aspects of the criminal justice system.[48] At the very outset, victims can decide whether to report a crime, and in fact most crimes are not reported. The filing of a formal "complaint" is often required before police will make an arrest for certain crimes. Victims also influence the decision to prosecute and whether to plea bargain.[49] It has rarely been suggested that it is improper for victim preferences to influence such matters, and any requirement to the contrary would certainly require substantial modifications in our criminal justice system.

[46] *Compare* Note, *The Outmoded Concept of Private Prosecution*, 25 Am. U.L. Rev. 754 (1976), *with* Note, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 Yale L.J. 209 (1955). *See also* Gittler, *supra* note 44, at 150-63; Cardenas, *supra* note 44, at 372-84.

[47] Decisions denying interested parties a role in criminal proceedings reflect descriptive, rather than normative, conclusions. For example, private parties, including victims, have been denied standing to compel enforcement of criminal statutes, but the lack of standing is generally related to the absence of any statute conferring a right to sue. Green, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute*, 97 Yale L.J. 488 (1988). *See also Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) (although standing to challenge nonprosecution was denied for lack of actual or threatened injury, "Congress may enact statutes creating legal rights, the invasion of which creates standing. . . .") *But see Young v. U.S. ex rel Vuitton et Fils*, 107 S. Ct. 2124, 2141 (1987) (Blackmun, J., concurring).

[48] Hall, *The Role of the Victim in the Prosecution and Disposition of a Criminal Case*, 28 Vand. L. Rev. 931 (1975).

[49] "The prevailing prosecutorial view is that the victim who most vigorously seeks full enforcement of the criminal law is the survivor of the deceased in a homicide case. Local prosecuting officials concede that 'great weight' is given to the victim's desires in serious felony cases, especially homicides." *Id.* at 948.

Recent years have seen a dramatic trend toward greater formal involvement of victims in the criminal process. Nearly all states and the federal government have adopted victim rights legislation that includes the consideration of victim impact at sentencing.[50] This legislation takes various forms, including the presentation of a formal victim impact statement at sentencing or according the victim a right of "allocution" comparable to the defendant's right to speak before being sentenced.[51] Under *Booth*, all of this legislation is invalid in capital cases.

Although the states and federal government have made progress in recognizing victims rights, most European countries accord victims greater rights of participation in the criminal process.[52] This aspect of comparative law indicates that victim participation in the criminal process is not an outdated vestige of primitive legal cultures.

B. Victim Participation Serves Important Social Purposes.

We have previously presented our view that the Constitution does not require all criminal punishments to be justified on utilitarian grounds. *See* part I.E. *supra*. However, from a purely utilitarian perspective, victim participation in the criminal process serves a number of important purposes. This analysis supports our view that *Booth* was wrong in excluding victim impact evidence in capital cases.

1. *Victim Involvement in the System Discourages Vigilantism.*

Justice Stewart's concurring opinion in *Furman* contains the following observation: "When people begin to

[50] A listing of these statutes is included as an appendix to this brief.

[51] See Gittler, *supra* note 44, at 172-76.

[52] See Hall, *supra* note 48, at 978-80; Cardenas, *supra*, note 44, at 384-87; Gittler, *supra* note 44, at 178-81.

believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law." 408 U.S. at 308. These concerns are not fanciful.

The victim's rights movement has gained strength in recent years, indicating widespread unrest among victims with the current criminal justice process.[53] Citizen's groups, such as the Guardian Angels in New York or the Nation of Islam in Washington, D.C., have chosen to provide their own "police force" due to growing skepticism of the State's ability to provide protection.[54] The public often allies itself with citizens who "take the law into their own hands" in response to the inability of the criminal justice system to recognize society's rights and needs.[55] All of these facts indicate that society is perhaps reaching the point at which the concept of justice held by the individual, and by the general public, is no longer satisfied by the law.

2. *A Right of Victim Participation Encourages Cooperation with Police and Prosecutors.*

When victims of crime perceive that the criminal justice system is not vindicating their interests, support for

[53] Both on the national and local levels, orgaizations have sprung up across the country to address issues of concern to crime victims and to promote the rights of victims. *See* Carrington and Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 Pepperdine L. Rev. 1 (1984); National Organization for Victims' Assistance, Victims' Rights and Service: A Legislative Directory (1987).

[54] Some of these groups have, at times, resorted to violent acts in an effort to subdue alleged wrongdoers. Earlier this year members of the Nation of Islam, who had assumed a patrol of a drug-ridden apartment complex in Washington, D.C., were reported to have severely beaten a man observed carrying a shotgun. Wash. Post, April 19, 1988, at A1.

[55] The case of Bernard Goetz is instructive. Goetz initially received much public suport for his actions. *See* N.Y. Times, Jan. 27, 1985, Sec. 4, at 20, col. 1 (discussing reasons for public support of Goetz).

the criminal justice system, which is crucial to the apprehension and conviction of criminals, declines. "Indeed, the conclusion has become nearly inescapable: a criminal justice system that ignores the interests of or ill treats the victim runs the risk of alienating the person upon whom its success as an institution depends." [56]

Crime victims are the major initiators of the criminal process. Approximately eighty percent of crimes are made known to the police through reports of citizens, usually victims.[57] Yet, various statistics indicate that many crimes go unreported.[58] Among the reasons why victims opt not to report crimes is the fear that the system is powerless to help them and might further victimize them.[59] Similarly, crime victims often choose not to cooperate with prosecution of the offender, leading to dismissal of many cases.[60] Non-cooperation is caused by both the administrative problem of lack of information, and by the systemic flaw of failing to take victims' views and interests into account.[61]

[56] Hudson, *The Crime Victim and The Criminal Justice System: Time for a Change*, 11 Pepperdine L. Rev. 23, 28 (1984).

[57] Gittler, *supra* note 44, at 147.

[58] Judge Mikva has noted that for every ten crimes committed, an estimated three or four are reported. This figure indicates a "pervading cynicism about the system's capacity to insure justice." Mikva, *Victimless Justice*, 71 J. Crim. L. & Criminology 189, 190 (1981). The Bureau of Justice Statistics, *U.S. Dep't of Justice Report to the Nation on Crime and Justice* (Oct. 1983) suggests that less than 50% of all violent crimes are ever reported.

[59] Kidd & Cajet, *Why Victims Fail to Report? The Psychology of Criminal Victimization*, 40 J. Soc. Issues 34-50 (1984), *cited in* Kilpatrick & Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 Wayne L. Rev. 7, 21 (1987).

[60] Gittler, *supra* note 44, at 148. *See also* Hudson, *supra* note 56, at 30.

[61] *See* Kelly *Victims' Perceptions of Criminal Justice*, 11 Pepperdine L. Rev. 15 (1984).

Since victims of crime have already suffered, physically and psychologically, it is not surprising that they choose to avoid involvement in the criminal process. Studies addressing victim involvement in the criminal process suggest that there is a high correlation between victims' satisfaction and their perceptions that they influenced the outcome or that the sentencing authority was sensitive to victim issues.[62] These studies confirm that a greater role for victims in the sentencing process may positively impact on the reporting and investigation of crime.

3. *Participation in the Criminal Justice System Helps to Remedy the Traumatic Effects of Crime on the Victim.*

Victimization carries with it profound psychological consequences, both immediate and long term, and it is often this psychological injury that has the greatest impact on the victim.[63] In addition to crime-related stress caused by feelings of inequity, loss of security, perceived greater vulnerability, and perception of being deviant, crime victims are psychologically affected by the lack of any role in the criminal process. The victim quickly learns that the system's resources "are almost entirely devoted to the criminal, and little remains for those who have sustained harm at the criminal's hands." [64] This realization, combined with the long duration of the capital criminal process, results in a feeling of loss of identity and additional emotional and psychological stress for the victim.[65] Permitting crime victims to participate in the proceedings can eliminate or reduce the potential for

[62] Kilpatrick & Otto, *supra* note 59, at 23-24 (citing J. Herndon & B. Forst, *The Criminal Justice Response to Victim Harm* (1984)).

[63] Task Force on the Victims of Crime and Violence, *Final Report of the APA Task Force on the Victims of Crime and Violence*, 40 Am. Psych. 107 (1985).

[64] *Id.* at 109.

[65] *Id.*; Gibbons, *Victim Again: Survivors Suffer Through Capital Appeals*, 74 A.B.A. J. 64 (Sept. 1988).

further psychological harm by reducing their perception of inequity or helplessness."[66] In particular, participation at the sentencing phase can be a cathartic experience for the victim, which helps bring an end to the psychological suffering that follows victimization.

C. The Extent of Harm to a Victim, Even if Unrelated to the Defendant's State of Mind, May Be Properly Considered As a Factor in Determining Whether to Impose Capital Punishment.

Our criminal justice system is rife with situations where the extent of harm caused the victim is relevant to the degree of culpability. The contrast in treatment between a reckless driver, who speeds through a red traffic light and continues on his way, and a similar driver who unintentionally kills a pedestrian, has previously been noted.[67] In the latter situation, the fact that the victim's presence was not anticipated and the harm not intended does not eliminate the defendant's culpability for homicide. Similarly, an offender may be punished for assaulting a federal officer, despite lack of proof that he was aware of the victim's status.[68]

Some have argued that the law should not take into account distinctions of this nature, which are unrelated to the individual defendant's personal moral culpability.[69] However, this theory has never been reflected in American criminal law in other contexts and has been persuasively criticized.[70] There is no reason to require capital sentencing proceedings to adhere to a legal theory that is largely unknown to our general criminal jurisprudence.

[66] Kilpatrick and Otto, *supra* note 59, at 19.

[67] *Booth*, 107 S. Ct. at 2540 (White, J. dissenting).

[68] *United States v. Feola*, 420 U.S. 671 (1975).

[69] *See* Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. Pa. L. Rev. 1497 (1974) (arguing, *inter alia*, that the penalty for drunk driving should be the same regardless of whether someone is killed).

[70] Holmes, *supra* note 42, at 41-51. Interestingly, Holmes' discussion points out that utilitarian theories are often advanced for imposing punishment without regard to individual moral blameworthiness.

D. Victim Impact Evidence Counterbalances the Defendant's Trial Strategy of Presenting Mitigating Evidence.

We have already described the decisions of this Court that give a capital defendant the right to present an unlimited range of evidence designed to appeal to the sympathy of the jury. *See* part I.D. *supra*. The impact of these decisions has been described as follows:

> In practical terms, . . . the death sentence will be imposed upon "the diminishing few who do not have this [mitigating] evidence (or as much of it) to offer." Penalties in capital cases ultimately will turn on mitigating evidence and on the advocate's ability to marshall and present that evidence. As a matter of law and practice, the opportunity to present almost any arguably mitigating evidence crucially distinguishes death penalty trials from all other criminal trials.[71]

Mitigation evidence has thus become a key part of the defendant's trial strategy. The elements of that strategy have even been articulated for the benefit of defense counsel, the main point being, "try to convey defendant's humanness to the sentencer."[72] An example of the effectiveness of the strategy is provided in the following case:

> Bernardino Sierra was mean, big and ugly, and he had done evil and inhuman things. In eight hours, he had committed twelve robberies, two maimings, and three killings. He had terrorized and tortured people. While one of his victims was lying on the ground with his face in a pile of broken glass, Sierra kicked him in the back of the head to drive glass into his eyes. Another victim also lay face down.

[71] Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 315 (1983) (citations omitted).

[72] *Id.* at 362.

Sierra raked his shotgun up the spine of this one, then fired into the wooden floor beside his head, exploding wood fragments into his head and neck. The experts said it was the "most likely case for capital punishment perhaps in the history of Harris County."

[At sentencing, Sierra presented evidence that] when he was a little boy, his stepfather would come home drunk at night and beat him with a wire whip, catching him while he was asleep. His stepfather would lock him out of the house at night sometimes, and he would crawl under it to make his miserable bed and try to sleep. Often he was hungry and had no food. He ate out of garbage cans. He brought the best food he found there home for his mother and little sister.

His mother told this to the jury. Then his son, a beautiful little boy, got on the stand and told the jury "That's my father." And the lawyer asked him, "What's the jury going to decide?" "Whether he lives or whether he dies," said the little boy.

The jury spared Sierra's life.[73]

Since capital defendants are given such extreme latitude in presenting mitigation evidence, it seems only fair to allow some presentation of victim impact evidence at the sentencing phase.[74] It may well be that a court should use its power under the rules of evidence to exclude particular items of victim impact evidence that are uniquely prejudicial.[75] However, the existence of a *per se* rule of

[73] *Id.* at 300-01 (footnote omitted).

[74] *See* American Bar Association, Guidelines for Fair Treatment of Victims and Witnesses in the Criminal Justice System 18 (1983).

[75] The fact that the prosecutor in this case referred to the victim's religious beliefs does not seem uniquely prejudicial. Defense counsel also frequently appeal to the religious sympathies of jurors. In one case where a jury decided not to impose the death penalty, evidence was introduced that the defendant had become a born-again Christian and was running a ministry from his prison cell. Weinberg, *Deregulating Death*, 1983 Sup. Ct. Rev. 305, 324-25 n.80 (describing the retrial after remand in *Lamb v. State*, 243 S.E.2d 59 (Ga. 1978)). Another tactic is for defense counsel to use religious arguments to "try the death penalty itself." Goodpaster, *supra* note 71, at 336, *citing Davis v. State*, 241 Ga. 376, 387, 247 S.E.2d 45, 52 (college religion professor permitted to testify in opposition to death penalty), *cert. denied*, 439 U.S. 947 (1978). In fact, this tactic was attempted in the instant case. At the end of his closing argument, defense counsel told the jury, "You are answerable only to God, the God of us all. Blessed are the merciful." Tr. 1214, quoting Matthew 5:7a.

exclusion gives the defendant an unwarranted advantage in seeking to appeal to the jury's sympathy.

Part of the concern about admitting victim impact evidence may derive from the belief that each human life must be treated as having equal value. The Court in *Booth* thought it wrong to impose more severe punishment for the death of a person who is wealthier, has more articulate relatives or whose loss evokes a greater sense of grief. 107 S. Ct. at 2534 n.8.

One answer, of course, is that the ideal of equality is never perfectly implemented in the criminal process. Defendants who are wealthier can hire more talented lawyers. More attractive defendants receive more lenient sentences. The law punishes the murder of a police officer or President more seriously than the murder of an ordinary citizen. A requirement of exact equality in the administration of capital punishment would be so unrealistic and unattainable as to deny the state the ability to exact such punishment at all. *McCleskey v. Kemp*, 107 S. Ct. 1756, 1781 (1987).

We can also question, however, the assumption that considering victim impact evidence will contribute to invidious discrimination on the basis of victim status. The facts of the instant case illustrate that a jury can be persuaded that justice requires the death penalty when the victim is not wealthy or socially prominent. Rather than emphasizing differences, victim impact evidence conveys our common humanity with those who suffer from crime and keeps us from thinking of them as faceless

abstractions. Richard Haynes, who was so brutally murdered by the defendant in this case, was a real and unique person. It is only just that the jury was permitted to understand this truth.

CONCLUSION

For the foregoing reasons, the Supreme Court of South Carolina should be reversed, and this Court's decision in *Booth v. Maryland* should be overruled.

Respectfully submitted,

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APPENDIX

APPENDIX

VICTIM IMPACT LEGISLATION

Federal

Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1242.

State

Alaska	—Alaska Stat. § 12.55.022 (Supp. 1988)
Arizona	—Ariz. Rev. Stat. Ann. §§ 12-253(4), 13-702(D)(9) (Supp. 1987)
California	—Cal. Penal Code §§ 1191.1 & 1203(h) (Supp. 1988)
Colorado	—Col. Rev. Stat. § 16-11-102 (1986)
Connecticut	—Conn. Gen. Stat. Ann. § 54-91 (1985)
Delaware	—Del. Code Ann. Title 11 §§ 4331(d) & (e) (1987)
Florida	—Fla. Stat. Ann. § 921.143 (1985)
Georgia	—O.C.G.A. §§ 17-10-1.1, 1.2 (1985)
Idaho	—Id. Code § 19-5306 (1985)
Illinois	—Il. Stat. Ann. §§ 38-1406, 1005-4-1(6) (Supp. 1988)
Indiana	—Ind. Code Ann. §§ 35-38-1-8 & 9 (1985 & Supp. 1988)
Iowa	—Iowa Code Ann. § 901.3 (Supp. 1988)
Kansas	—Kan. Stat. Ann. § 21-4604(2) (Supp. 1987)
Kentucky	—Ky. Rev. Stat. §§ 421.500(5)(b), 421.520 (1985)
Louisiana	—La. Rev. Stat. § 46:1844(9) (Supp. 1986)
Maine	—Me. Rev. Stat. Ann. Title 17-A § 1257 (Supp. 1988)

Maryland	—Md. Code Ann. art. 41 § 4-609 (1987)
Massachusetts	—Mass. Ann. Laws ch. 279 § 4B (Supp. 1988)
Michigan	—Mich. Stat. Ann. § 28.1287 (763) (764) (765)
Minnesota	—Minn. Stat. Ann. §§ 609.115, 611A.037 (Supp. 1988)
Mississippi	—Ms. Code §§ 99-19-151 to 161 (Supp. 1988)
Missouri	—Mo. Rev. Stat. § 595.203 (1986)
Montana	—Mont. Code Ann. § 46-18-112 (1987)
Nebraska	—Neb. Rev. Stat. § 29-2261 (1985)
Nevada	—Nev. Rev. Stat. § 176.145 (1987)
New Jersey	—N.J. Stat. Ann. § 2C:44-6.b (Supp. 1988)
New Mexico	—N.M. Stat. Ann. § 31-24-5 (1987)
New York	—N.Y. Crim. Proc. Law § 390.30(3b) (Supp. 1988)
North Carolina	—N.C. Gen. Stat. §§ 15A-825, 15A-1340.4 (1987)
North Dakota	—N.D. Cent. Code ch. 12.1-34-02.14 (Supp. 1987)
Ohio	—Ohio Rev. Code Ann. § 2947.051 (Supp. 1985)
Oklahoma	—Okla. Stat. Ann. Title 22 § 982 (1986)
Oregon	—Or. Rev. Stat. § 144.790(2), (4) (1983)
Pennsylvania	—71 Pa. Stat. § 180-9.3 (Supp. 1987)
Rhode Island	—R.I. Gen. Laws §§ 12-28-4 to 4.3 (Supp. 1986)
South Carolina	—S.C. Code Ann. § 16-3-1550 (1985)
Tennessee	—Tenn. Code Ann. §§ 40-35-207(8), 40-35-209 (Supp. 1987)

Texas	—Tx. Stat. Ann. §§ 56.02, 56.03 (Supp. 1988)
Vermont	—Vt. Stat. Ann. Title 13 § 7006 (Supp. 1988)
Virginia	—Va. Code Ann. § 19.2-299.1 (Supp. 1988)
Washington	—Wash. Rev. Code § 7.69.030 (Supp. 1989)
West Virginia	—W.Va. Code §§ 61-11A-2 & 3 (1984)
Wisconsin	—Wis. Stat. Ann. § 950.04(2m) (Supp. 1988)
Wyoming	—Wy. Stat. §§ 7-13-303(a)(iv), 7-13-402(e)(v) (1987)